

Hon. James L. Robart

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

VHT, INC., a Delaware corporation,

Plaintiff,

v.

ZILLOW GROUP, INC., a Washington  
corporation; and ZILLOW, INC., a Washington  
corporation,

Defendants.

Case No. 2:15-cv-01096-JLR

**ZILLOW'S MOTION FOR  
PARTIAL JUDGMENT  
ON THE PLEADINGS**

NOTE ON MOTION CALENDAR:  
May 13, 2016

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## I. INTRODUCTION

Zillow moves for judgment on the pleadings as to VHT's requests for statutory damages and attorney fees because, in light of the facts alleged in VHT's complaint, those remedies are legal impossibilities in this case. 17 U.S.C. §§ 504 and 505 authorize statutory damages and attorney fees in copyright cases, but with a key prerequisite: 17 U.S.C. § 412 of the same statute provides that neither of these remedies "shall be made for" the infringement of unregistered copyrights. VHT's copyrights are not registered.

Although artful pleading in VHT's complaint somewhat obfuscates the facts, they are these: at the time of its initial complaint VHT had filed applications for copyright registration; since that time, all of those applications have been rejected. In a series of letters dated three months after VHT's initial complaint, the United States Copyright Office announced its affirmative decision to refuse VHT's applications, because VHT's works do not meet the criteria for registration. This formal notice of rejection – the fact of which is not subject to reasonable dispute and which is public record – is judicially noticeable, and therefore fatal to any attempt by VHT to recover remedies under §§ 504 or 505.

This state of affairs is a textbook case warranting a judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Without registration, VHT simply cannot clear the statutory hurdle to statutory damages or attorney fees. Or, put another way, the allegations in VHT's complaint cannot possibly support the award of statutory remedies, because VHT will never be entitled to such remedies unless the facts about its registration status change. A ruling on this legal issue now, before discovery begins in earnest, will narrow the parties' focus to what is actually on the table at trial. In addition to clarifying the scope of discovery, a ruling now will also provide guidance as to its depth; recent amendments to the Federal Rules of Civil Procedure re-emphasized that a court must give the amount in controversy considerable weight when it considers whether a discovery undertaking is unduly burdensome. Clarifying what remedies are, and are not, available will do exactly that. For these reasons, and for the reasons

that follow, Zillow respectfully requests that this Motion for Partial Judgment on the Pleadings be granted.

## II. FACTS

On July 8, 2015, Plaintiff VHT, Inc. (“VHT”) filed this action alleging that Defendants Zillow Group, Inc., and Zillow, Inc. (collectively, “Zillow”) have infringed VHT’s copyrights in certain photographs, under 17 U.S.C. § 106. *See* ECF Nos. 1, 24 (summarizing issues in case).

The initial complaint asserted that “VHT registers its copyrights” in those photographs, and that VHT “has been filing additional registrations” on a quarterly basis. *Id.* ¶27. In fact, the “registrations” to which VHT referred were mere applications that it had filed; an important distinction that VHT’s complaint only incidentally acknowledged when it described those registrations as “pending.” *Id.* The remainder of VHT’s complaint misrepresented the registration status of its photographs, however, by repeatedly referring to VHT’s “registered copyrighted photographs” (*id.* ¶83), or “registered works” (*id.* ¶¶95, 106, 114). *See also* ECF No. 24 at 3 (VHT’s portion of joint status report, complaining of infringement of its “registered copyright-protected images”); *id.* at 6 (“registered images”).

VHT’s disregard for the distinction between a registered copyright and an application for such registration may have had little legal effect had its applications ultimately been granted, but that is not what happened: on September 22, 2015, the United States Copyright Office sent VHT a series of letters providing notice that it had investigated VHT’s applications and was rejecting all of them. Exs. A-C.<sup>1</sup> Each letter stated, after setting forth the requirements for registration, that:

You have attempted to comply with these requirements, but there is not sufficient compilation authorship. We are refusing to register these databases and are closing the files.

*Id.* The letters thus disposed of eight of VHT’s ten pending applications. Rather than pursue the approval of the other two applications, which presumably remained open, VHT filed an application for reconsideration of the rejections on December 14, 2015, acknowledging that the

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<sup>1</sup> All references to “Ex.” herein refer to Exhibits to the concurrently-filed Declaration of Patrick C. Bageant.

1 registerability of all ten applications would rise or fall together, because each presented the same  
 2 issues. Ex. D at 2. Although that application for reconsideration remains pending, the Copyright  
 3 Office has not yet reconsidered its rejections, and VHT's copyrights remain unregistered.

4 Notwithstanding the undisputable fact that none of the copyrights that VHT alleges Zillow  
 5 to have infringed are registered, VHT filed its First Amended Complaint ("FAC") on January 20,  
 6 2016. ECF No. 53. The FAC echoed the assertions in VHT's initial complaint, alleging that VHT  
 7 "registers its copyrights" and "has filed applications to register photographs in its database  
 8 created from the beginning of 2010 through the end of the third quarter of 2015." *Id.* ¶29.  
 9 Although technically accurate – VHT had, in fact, "filed applications" – the statement is  
 10 incomplete: the Copyright Office had also rejected the applications four months prior. Continuing  
 11 in the vein of partial disclosure, the FAC purported to include "[t]rue and correct copies of the  
 12 applications for VHT's registrations" as exhibits, but made no mention of the status of those  
 13 applications (rejected), or of the fact that VHT was no longer seeking simply registration, but  
 14 reconsideration and reversal of the Copyright Office's determination. Like the original complaint,  
 15 the FAC then proceeded to assert that Zillow had infringed VHT's "registered works." *Id.* ¶¶128,  
 16 138, 147.

17 Based upon its factually incorrect classification of the works at issue as "registered,"  
 18 VHT's FAC (like the original complaint) sought statutory damages under 17 U.S.C. § 504(c) for  
 19 alleged infringement by Zillow "after the effective date of VHT's registration." ECF No. 53 ¶111;  
 20 *see also id.* ¶¶124, 135, 143, 152. The FAC also sought attorney fees pursuant to 17 U.S.C. § 505.  
 21 *Id.* at 42.

### 22 III. LEGAL STANDARDS

23 Judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is  
 24 proper "when the moving party clearly establishes on the face of the pleadings that no material  
 25 issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal*  
 26 *Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). A  
 27

1 motion for judgment on the pleadings is thus “functionally identical” to a motion to dismiss under  
 2 Rule 12(b) of the Federal Rules of Civil Procedure, the principal difference between them being  
 3 “the time of filing.” *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).  
 4 Unlike a Rule 12(b) motion, so long as a Rule 12(c) motion is “early enough not to delay trial” it  
 5 may be brought at any time “[a]fter the pleadings are closed.” Fed. R. Civ. P. 12(c). The  
 6 pleadings “are closed for the purposes of Rule 12(c) once a complaint and answer have been  
 7 filed.” *Shame on You Prods., Inc. v. Elizabeth Banks*, 120 F. Supp. 3d 1123, 1142 (C.D. Cal.  
 8 2015) (granting Rule 12(c) motion in copyright case).

#### 10 IV. ARGUMENT

11 The pleadings on VHT’s FAC have closed, and they show that Zillow is entitled to  
 12 judgment in its favor on VHT’s claim to statutory damages under 17 U.S.C. § 504(c), and to  
 13 attorney fees under 17 U.S.C. § 505. Each of those remedies requires – as a statutory prerequisite  
 14 – that the allegedly infringed work be registered with the United States Copyright Office, yet the  
 15 face of the FAC does not contain any fact to support the essential element of registration. This is  
 16 because VHT’s attempt to register its copyrights have been denied. These facts (lack of  
 17 registration combined with outright rejection), no matter how charitably construed in VHT’s  
 18 favor, simply cannot add up to a finding that VHT’s copyrights have been “registered.” Judgment  
 19 on the pleadings as to each claim by VHT that requires registration is therefore appropriate. *Hal*  
 20 *Roach Studios*, 896 F.2d at 1550 (judgment on the pleadings is appropriate where the moving  
 21 party establishes, construing all facts in the non-moving party’s favor, “that it is entitled to  
 22 judgment as a matter of law.”).

#### 23 A. Statutory Damages and Attorney Fees Are Not Available for Infringement of 24 Unregistered Works.

25 Although a copyright holder can sue for infringement at any time within the statute of  
 26 limitation, her remedies are more constrained if the copyrights at issue are not registered: she will  
 27 be entitled to statutory damages and attorney fees only if her copyright is registered with the



Copyright Office. This carrot approach – whereby Congress has sought to incentivize copyright holders to register their works by barring the availability of statutory damages and attorney fees until they do so<sup>2</sup> – is codified in 17 U.S.C. § 412 (“Registration as prerequisite to certain remedies for infringement”):

In any action under this title . . . no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for<sup>3</sup>—

- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

§ 412. That is, if a work has never been published, “no award of statutory damages or of attorney’s fees” is permissible before the date it is registered. *Id.* If the work has been published, “no award of statutory damages or of attorney’s fees” is available before the date of publication (unless the work became registered less than three months later). *Id.* Whether the work is published or not, the rule is therefore clear: registration is an absolute “prerequisite” to statutory damages or attorney fees. *Id.*

Merely filing an application, without waiting to obtain registration, is not sufficient basis to authorize a lawsuit for statutory remedies. Although federal courts have jurisdiction over infringement claims even for unregistered copyrights (*Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 169 (2010)), and plaintiffs in the Ninth Circuit may file suit based on application without waiting for the Copyright Office to grant registration (*Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 618-20 (9th Cir. 2010)), that rule pertains only to the legal

<sup>2</sup> See H. R. Rep. No. 94-1476, at 158 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5774 (“Copyright registration . . . is useful and important to users and the public at large . . . and should therefore be induced in some practical way.”).

<sup>3</sup> The ellipses in this quotation is § 412’s language providing a narrow exception for actions under §§ 106A(a), 408(f), or 411(c). The language is omitted for clarity because those sections are not pertinent to this case. See ECF No. 53 ¶¶109, 122, 128, 138, 147 (each alleging infringement under §§ 1061(1), (2), (3) or (5)).

right to file suit, not the remedies available. The statutory framework set forth by 17 U.S.C. § 412 speaks directly to the remedy, and controls its availability. *See Choyce v. SF Bay Area Indep. Media Ctr.*, No. 13-CV-01842, 2013 WL 6234628, at \*3 (N.D. Cal. Dec. 2, 2013) (plaintiff was given leave to amend complaint that failed to allege that the plaintiff had received or even applied for registration, but the amended complaint would not be permitted to seek statutory damages because registration had not occurred before alleged infringement began); *Dos Santos v. Telemundo Commc'ns Grp., LLC*, No. 12-1373, 2012 WL 9503003, at \*7 (C.D. Cal. Dec. 19, 2012) (“The Court STRIKES Plaintiffs’ request for attorneys’ fees and costs and statutory damages because the works were not registered when the infringement began.”).

**B. The Copyrights VHT Asserts Here Are Unregistered.**

VHT’s FAC (ECF No. 53) and its exhibits do not contain a single copyright registration certificate or number. Rather, they contain only VHT’s applications for registration. *See* ECF No. 53-1. It is self-evident that an “application” for copyright registration is not an actual grant of “registration” any more than an application for a loan is a loan; in both instances, the approval of an application creates legal rights that the mere filing of such application does not. The FAC and the documents that VHT attached to it simply do not show that VHT registered the copyrights at issue, and therefore provide no indication that the remedies available to the owner of registered copyrights in the event those copyrights have been infringed are available to VHT.

Nor does the speculative possibility that the Copyright Office might someday reverse course and register VHT’s works alter the analysis: in the Ninth Circuit “the first act of infringement in a series of ongoing infringements of the same kind marks the commencement of one continuing infringement under § 412.” *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 701 (9th Cir. 2008) (emphasis in original). Thus, even taking all of VHT’s allegations as truth, the infringement charged in VHT’s FAC can never be the basis for an award under §§ 504 or 505. *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 144 (5th Cir. 1992) (a plaintiff may not

1 recover statutory damages for infringements that commenced after registration if the same  
2 defendant commenced an infringement of the same work prior to registration).

3 **C. In Fact, the Copyright Office Has Rejected and “Closed the File” on VHT’s**  
4 **Attempts to Register the Copyrights it Asserts Here.**

5 VHT’s situation is worse, however, than the mere absence of a registration: the Copyright  
6 Office has denied VHT’s applications, stating in multiple letters that:

7 The selection and/or arrangement of entries in this work do not meet the  
8 requirements of original compilation authorship. . . . You have attempted to  
9 comply with these requirements, but there is not sufficient compilation  
authorship. We are refusing to register this database and are closing the file.

10 Exs. A-C. VHT thus has no argument that it is merely waiting for the paperwork to go through;  
11 the Copyright Office has made known its refusal to process it.

12 VHT will protest, no doubt, that it has filed an application for “reconsideration” of the  
13 Copyright Office’s rejections of its applications. Factually, that is true. But that only underscores  
14 the fatal reality: VHT does not hold copyright registrations. Only by “reconsidering” the refusal  
15 to issue – that is, by changing the facts into something different than what they are – could VHT  
16 ever amend its complaint to provide a basis for to statutory remedies.

17 VHT may also make a formalistic argument that the Court should not consider the  
18 Copyright Office’s rejections of its applications, because the rejections were not attached to or  
19 incorporated into its FAC. Setting aside the compelling equitable reasons to correct the FAC’s  
20 failure to tell the whole story, that argument has no merit. This Court can consider the Copyright  
21 Office’s rejection under several black-letter doctrines.

22 First, the Court can take judicial notice of the fact that the Copyright Office has rejected  
23 VHT’s applications, because it is a matter of public record. *Ray Charles Found. v. Robinson*, 795  
24 F.3d 1109, 1114 (9th Cir. 2015) (taking judicial notice of Copyright Office records of voluntary  
25 termination of registration because courts “may take judicial notice of undisputed matters of  
26 public record.”); *see also Jones v. Collectal Associates*, No. 15-CV-02223, 2016 WL 721279, at  
27 \*1 (N.D. Cal. Jan. 29, 2016), *adopted sub nom.* No. 15-CV-02223, 2016 WL 879870 (N.D. Cal.

Mar. 8, 2016) (“The Court takes judicial notice of public records of the United States Copyright Office [showing the content of, and facts about, a photograph]”). Like the termination notices in *Ray Charles Foundation*, and like the photograph in *Jones*, the Copyright Office’s refusal to register VHT’s copyrights is a matter of public record. *See* 17 U.S.C. § 705 (providing that copyright office records shall be maintained, and that such records “shall be open to public inspection.”); Compendium II of Copyright Office Practices § 1902.03 (“Official correspondence, including . . . a rejected application for registration . . . is open for public inspection and copying.”) (emphasis added). The fact that the rejection occurred is thus fully within the ambit of judicial notice.

Second, a separate but equally valid ground for judicial notice is that the Copyright Office’s ruling is integral to VHT’s claims. *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (a district court may consider “documents crucial to the plaintiff’s claims, but not explicitly incorporated in his complaint” when doing so will prevent “plaintiffs from surviving a [dispositive] motion by deliberately omitting references to documents upon which their claims are based.”). Thus, “district courts may take judicial notice of documents that the pleadings do not mention, provided the documents are integral to the plaintiff’s claims.” *Milo & Gabby, LLC v. Amazon.com, Inc.*, 12 F. Supp. 3d 1341, 1351 (W.D. Wash. 2014). Here, there can be no serious dispute that the Copyright Office’s ruling on VHT’s registration application is “integral” to VHT’s statutory damages and attorney fee claims; VHT is barred entirely from obtaining those remedies until and unless it obtains registration. Indeed, it would be absurd to proceed as if this basic matter of public record did not exist given that it is central to – and dispositive of – VHT’s statutory damages and attorney fee claim.

**D. The Court Should Rule on the Pleadings at this Time that Statutory Remedies Are Unavailable.**

Because registration is a statutory prerequisite to statutory damages and attorney fees, and because the public record nullifies any argument that VHT has met it, Zillow respectfully submits that it is entitled to ruling in its favor on those issues.

Aside from the fact that Zillow is legally entitled to a judgment are tremendous practical reasons for the Court to enter one: the unwarranted inclusion of the issues of statutory damages and attorney fees in the FAC are impeding the orderly progression of this litigation. VHT's FAC asserts that it is entitled to statutory damages and fees amounting to tens of millions of dollars. An order confirming that this drastic windfall is not available to VHT will not only sharpen and narrow the issues for trial, it will also set boundaries on the extent of damages and liability for both parties. This will assist the parties and Court in weighing the amount in controversy, which is a significant factor in evaluating proportionality under rule 26(b)(1) (*see* Fed. R. Civ. P. 26(b)(1) & 26(b)(1) 2015 Advisory Comm. Note), and will increase the likelihood of a non-judicial resolution of this action.

## V. CONCLUSION

For the foregoing reasons, Zillow respectfully requests a judgment that statutory remedies under 17 U.S.C. §§ 504 and 505 are not available to VHT, because its copyrights at issue are not registered.

Dated: April 20, 2016

By: /s/ Patrick C. Bageant

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 20, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record:

By: /s/ Patrick C. Bageant